UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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KALOMA CARDWELL,

Plaintiff,

v. 19 Civ. 10256 (GHW)

DAVIS POLK and WARDWEL LLP, et al.,

Conference
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New York, N.Y.
December 20, 2019
3:30 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

LAW OFFICES OF MARTIN E. RESTITUYO, P.C.
Attorneys for Plaintiff
MARTIN RESTITUYO
DAVID JEFFRIES

PAUL WEISS, RIFKIND, WHARTON & GARRISON, LLP
Attorneys for Defendants
BY: JEH JOHNSON
BRUCE BIRENBOIM
MARISSA DORAN
SUSANA BUERGEL

(Case called)

MR. RESTITUYO: For the plaintiff, Martin Restituyo.

MR. JEFFRIES: David Jeffries, for the plaintiff, your Honor.

Good afternoon.

THE COURT: Thank you. Good afternoon.

MR. JOHNSON: Jeh Johnson, from Paul, Weiss, Rifkind, Wharton & Garrison, with my colleagues, Bruce Birenboim, Susana Buergel, and Marissa Doran.

THE COURT: Thank you.

Thank you all for being here today. I scheduled this as an initial pretrial conference with respect to this matter. My agenda is as follows:

First, I will give each of the parties the opportunity to describe any legal or factual issues that they'd like to bring to my attention in connection with the case. I've reviewed all the materials that have been submitted on the docket today. Still if there's anything you would like to draw to my attention, you'll have the opportunity to do that.

Second, I hope to discuss the process that we'll be using to litigate this case going forward. In connection with that portion of the conference, I expect to discuss the anticipated motion to dismiss and also the parties' proposal with respect to the case management plan and scheduling order of which I expect I will use as a framework for that

conversation. And lastly, I hope to discuss anything I can do to help. That's my agenda for this conference.

Counsel, before we proceed, is there anything any of you would like to add to or ensure that we include in that agenda?

Counsel for plaintiff?

MR. RESTITUYO: No, your Honor.

THE COURT: Thank you.

So with that established, counsel for plaintiff, what would you like to tell me about the case?

MR. JEFFRIES: Your Honor, I'd like to begin with a very brief recitation of the facts. I believe that as your Honor has indicated, you're familiar with everything. But just to encapsulate our position, Judge, in a lot of regards this boils down to a case of buyer's remorse. The plaintiff was a top-tier law student. He was recruited heavily by the defendant. During the recruitment process, there was an ongoing conversation about the plaintiff's dedication to social advocacy, specifically matters of racial disparity and uneven treatment with respect to African Americans overall and within the actual legal system.

Without reiterating every aspect of the 86-page complaint that was filed, I would just like to draw your Honor's attention to the following:

The fact that it was under those tenets that

Mr. Cardwell accepted a position with defendant's law firm in 2014 as a law associate. And within the confines of that ongoing conversation about racial inclusion and social justice, specifically with regard to African Americans within the legal system, that Mr. Cardwell raised certain issues that had come before him within his employment during the firm, not in a hypothetical sense but in a real direct sense, things that had happened to him, things that he flagged to management, things that he flagged to people that were understood overall both implicitly within the firm and by virtue of their position in the firm as being the people that can actually take care of the issues that were raised by Mr. Cardwell.

Your Honor, those complaints which centered on uneven racial discriminatory behavior to him, experienced firsthand within the firm, were ignored. Mr. Cardwell was isolated, and he was deprived from work. On the tail-end of that and while that was going on, Mr. Cardwell attempted to make his frustrations known by using every channel available, person-to-person conversations with management, including the managing attorney, by flagging the behavior that he witnessed to the director of personnel, by reaching out to other individuals in a position to address the things that were in realtime happening to him with respect to his experience at the firm. And when he did that, when it became clear that not only was he going to observe and identify those issues but actually

vocalize them, Mr. Cardwell was retaliated against deliberately and directly.

The retaliation took the form of a precipitous drop in his workload that under no theory can be rationalized within the context of a big law firm. Beyond that specific instance, there were reviews and other corresponding items generated during the course of his employment that were weaponized, your Honor. They were weaponized and deployed in a fashion to make Mr. Cardwell's stay unwelcome and to make it clear that he did not have an opportunity to advance within the firm. Your Honor, Mr. Cardwell utilized the opportunities available to him to address these issues, specifically making a claim with the EEOC. That was met with further retaliation, your Honor. Ultimately Mr. Cardwell's employment was terminated in 2018.

I wanted to take this opportunity to simply bring to bear some of the issues that are the most salient with respect to our complaint and which we believe would be carried forward and addressed in any of the other aspects of this conference and the case overall.

THE COURT: Thank you. Good.

Counsel for defendants, what would you like to tell me about the case?

MR. BIRENBOIM: Good afternoon, your Honor.

We will be very brief. Our position is set fort in

the letter, which your Honor has reviewed. I would just summarize Davis Polk's position as follows:

This is a case of Davis Polk having an associate who it very much wanted to succeed and to whom Davis Polk gave every opportunity to succeed over a period of years. The facts will show that over that period of time he simply did not perform at the very high level that an M&A associate in the third or fourth, or fifth year at Davis Polk is expected to perform. And that is the reason why he was ultimately terminated after giving him second, third, fourth, and fifth chances. And the evidence will show that that is, in fact, the case and that none of this is causally related to the issues that plaintiff's counsel is discussing.

And the fact is, your Honor, that it is not unusual in any way for an associate at his level to be told at some point that they their performance is not sufficient to continue at the firm. So he was treated no differently than any other associates. None of the treatment of Mr. Cardwell was based on his race. He was terminated for performance reasons.

Thank you, your Honor.

THE COURT: Good. Thank you very much.

So, counsel, I'd like to discuss the process that we'll be using to litigate the case going forward. The parties' joint letter -- and as I understand, the defendants anticipate requesting leave to file a motion to dismiss the

case in connection with a number of matters which are outlined in this letter.

Counsel, as you're aware, in accordance with my individual rules of practice, the parties are required to submit a premotion conference request letter prior to filing a motion to dismiss.

Counsel for defendants, do you intend your component of the joint letter submitted here to be treated as your premotion conference request letter?

MR. BIRENBOIM: Yes, your Honor.

And I'm certainly happy to spend a minute on it if your Honor pleases, or we will submit a separate letter if your Honor wishes.

THE COURT: Thank you. I'll be happy to discuss this potential motion on the basis of the statements in the joint letter that was submitted to me.

Counsel, let me hear counsel for defendants regarding the bases for the anticipated motion to dismiss.

Counsel for defendants?

MR. BIRENBOIM: Yes, your Honor.

Again, I'll be brief. There are three basic arguments. First, as your Honor knows, Davis Polk, in a series of individuals, at Davis Polk, or formerly Davis Polk, were named in the complaint. The law is crystal clear under Title 7 that only the employer can be a defendant; individuals cannot

be a defendant. And we have the case cites, of course. But we think that's crystal clear, that the individual defendant should be dismissed from the Title 7 claim.

Secondly, your Honor, it's a somewhat complicated history of this case in the administrative proceedings. But the short of it is that Mr. Kaloma filed a complaint with the EEOC and with the New York State Division of Human Rights. He filed a complaint that has the New York State Division of Human Rights caption. We put in a response. They put in a reply. There were supplemental submissions. So the matter was litigated -- or being litigated before the New York State Division of Human Rights. And the cases support the proposition that with respect to the state and city claims, if a claimant chooses his remedy as pursuit of it in the administrative agency, then you cannot then pursue the same causes of action in court.

THE COURT: Thank you.

In the letter you say that the bars from -- that litigated these claims in federal court "pending the resolution of certain procedural matters before the NYSDHR."

What are you referring to?

MR. BIRENBOIM: Your Honor, if you'll bear with me for a minute.

The claim was filed with the New York State Division of Human Rights. There were submissions. A long period of

time followed. And then, in August of this year, we understand that the EEOC issued a right-to-sue letter that said that it was basing its right to sue letter on a finding of no probable cause by the state agency. We had not received that finding. We asked counsel for the plaintiffs. They couldn't locate it. We could not locate it anywhere else. We had several conversations with the EEOC and with the New York State Division of Human Rights to try and untangle what happened. And as a result of those conversations, two things happened: The EEOC issued an amended right-to-sue letter very recently that said, in effect: We made a mistake. We issued the right-to-sue letter not because of a prior finding by the state agency but because of a request from plaintiff's counsel.

On the state side, the state sua sponte issued a dismissal of Mr. Cardwell's claims in the state agency for administrative convenience, which we believe is inappropriate on these facts, and we've made a submission to the state agency requesting that that be reversed. And that's presently under consideration. So it's a little bit muddled, but our hope is by the time we make the motion, these issues will be clear. We believe we still have a motion no matter how that turns out, your Honor.

THE COURT: Thank you.

MR. RESTITUYO: Your Honor, may I address that point?

THE COURT: First, Counsel, I'll ask you to please

stand. Please bear with me for one moment. I'd like to ask counsel for defendants one question.

Counsel, assuming that the situation remains as it currently stands before the state division of human rights, is it your position that the defendants will still have a motion on this issue?

MR. BIRENBOIM: Yes, your Honor.

THE COURT: Thank you. Why?

MR. BIRENBOIM: And, your Honor, we have one more basis for the motion --

THE COURT: I'm sorry. Do you still have a potentially viable motion on the grounds related to the pursuit of his rights before the NYSDHR?

MR. BIRENBOIM: Correct.

THE COURT: Why?

MR. BIRENBOIM: So we have a motion directed to the Title 7 claim with individuals. We have a motion directed to the election of remedies, which is what we were just discussing. And then with respect to the individuals, there are certain statutes of limitations --

THE COURT: I'm sorry. Let me just pause you here.

MR. BIRENBOIM: Yes.

THE COURT: To the extent that the State Division of Human Rights' determination that the proceedings there remain terminated as a matter of administrative convenience, do you

still have a viable claim to dismiss the New York City and New York State law claims on the basis of election of remedies?

MR. BIRENBOIM: We believe we do, your Honor. But we also understand that the motion is a lot less clear if the dismissal for administrative convenience stands.

THE COURT: Thank you. Please proceed.

MR. BIRENBOIM: The final ground for the motion, your Honor, is there are a series of defendants in this case who are alleged to have done different things at different times. Some, fewer acts are alleged than others. And the individual defendants were not named in the prior state and EEOC proceedings. And, therefore, the statute of limitations was running with respect to them. So we will likely have a third ground with respect to individual defendants. And there will be different arguments with respect to each one. But we believe some or all of the claims may be able to be dismissed on statute of limitations grounds with respect to some or all of these individuals.

THE COURT: Thank you. Good.

So, counsel for plaintiff, this is not oral argument on the motion itself. I expect that I would review the motion on the basis of the parties' submissions. It still can be helpful for me to hear from the parties regarding any arguments you may expect to put before me in connection with your opposition to anticipate a motion.

If there's anything that you'd like to present to me now, you're welcome to do so.

MR. RESTITUYO: No, your Honor. I'm happy with saving everything for oral argument and on the papers.

I did want to clear up the procedural history that counsel laid out, wherein things happened in a very particular order. But I think your Honor got to the crux of it, which is ultimately the cases were dismissed by the EEOC and the New York Division of Human Rights for administrative convenience, and I do not think that precludes us from proceeding in this venue.

THE COURT: Thank you. Counsel, can I ask.

Is the plaintiff pursuing Title 7 claim against the individual defendants?

MR. RESTITUYO: Your Honor, I suspect that those will have to be withdrawn at some point.

THE COURT: Thank you. Let me suggest that the parties discuss that issue to the extent that it would obviate the need for briefing on that topic. I think it would be efficient for all parties and for the Court. So I'm going to invite you to discuss the prospect of -- stipulating to the dismissal of any claims against the individual defendants pursuant to to Title 7.

Counsel for defendants, I'd like to talk about the timing for this motion. I understand that the parties have

stipulated to a deadline for the answer to the complaint.

Is it correct that you anticipate that you'll be filing this potential motion on the date that you discussed with plaintiff?

And, second, to what extent does the ongoing discussions regarding the dismissal of the state claims have an impact on the timing of the anticipated motion?

Counsel?

MR. BIRENBOIM: Your Honor, as I suggested, I'll answer your second question first.

I think our expectation is that the state record will be clarified by the time we make our motion. We would hope that that's the case. And if it's not the case, we may be asking for a bit more time. But our expectation is that that will happen, because there is a pending motion before the New York State Division of Human Rights about whether to strike this dismissal for administrative convenience or not, and we expect that will get decided fairly promptly.

THE COURT: Good. Thank you very much.

MR. BIRENBOIM: And then with respect to your first question, your Honor, we would be making our motion on the due date, subject to any discussion about mediation, which is something we may wish to discuss with the Court. But I'm not sure we should -- I don't know if the Court wants us to discuss that, but we may have an issue with that, your Honor.

THE COURT: Fine. Thank you. Good.

So I anticipate seeing the anticipated motion to dismiss by the date agreed upon. To the extent that there's an application to extend that deadline, please submit it by joint letter in accordance with my rules.

Counsel for plaintiff.

MR. BIRENBOIM: Your Honor?

THE COURT: Yes.

MR. BIRENBOIM: I'm sorry. Just with respect to that, we don't actually formally have a stipulation yet extending time. We accepted service in exchange for time, and we have been going back and forth on exactly what date that is. But we think we can work that out with plaintiff.

THE COURT: Thank you. Let's make that date concrete now.

What's the defendant's position regarding the due date for your answer under the response to complaint?

MR. BIRENBOIM: We would like the beginning of February, your Honor. That will ensure us that we clarify things with the New York state division.

THE COURT: Thank you.

Counsel for plaintiff, what's your view with respect to that issue? I should say as an introductory comment with respect to this discussion that you should not predicate your briefing schedule with the expectation that I'll necessarily

stay discovery pending resolution of the motion.

Counsel for plaintiff, what's your view regarding the defendant's proposal regarding the timing for the submission of the motion?

MR. RESTITUYO: Your Honor, we very much oppose. We did have initial conversations with the defendants and agreed to what we thought was a generous January 17th date. To be clear, there were conversations that were being had or requests being made to New York Division of Human Rights that we only recently became ware of. And so we now understand why their interest in sort of delaying matters in order to seek a re-evaluation from the New York Division of Human Rights. But we had in good faith agreed to a 60-day timeline of ending on January 17th, and we would hope that we can agree to that date.

THE COURT: Thank you.

I'm sorry. Counsel, I don't see on the docket or record that the plaintiffs have filed proof of service or waiver of service.

Has that been filed on the docket? And if not, can I ask what is the parties' representation regarding the date of service or waiver?

MR. BIRENBOIM: Your Honor, if I may --

THE COURT: I'm sorry. Counsel for plaintiff, have you filed an affidavit of service?

MR. RESTITUYO: We have not, your Honor, because once

we -- once -- basically what happened is, the complaint was filed, we were approached by defendant's counsel, they agreed to accept service and agreed to a stip. And then part of what's been holding up that stipulation wherein they're accepting service is this back and forth with respect to dates.

THE COURT: Thank you.

Counsel for defendants?

MR. BIRENBOIM: We have not been served. And our understanding was that we would enter into a stip for a date to respond that we agreed with in exchange for accepting service on behalf of all the defendants. And, your Honor, just to be clear, part of this request for a week or two more than we had originally discussed is based on hoping that the administrative record will be cleared up. Part of it is just, frankly, for professional convenience because of the holidays. If the Court requires us to respond earlier, we, of course, will. This is really not a significant extension at all. I think the 60 days are what you get automatically under the rules for accepting service. So we haven't really asked for more than a week or two that would automatically be --

THE COURT: Thank you. Good.

So assuming that the defendants are properly served, I'm happy to establish a deadline that would require that the motion to dismiss be filed no later than February 10, 2020.

Counsel for plaintiff, any opposition to that motion

will be due no later than three weeks following service of the motion. Any reply would be due no later than one week following service of the opposition.

Good. So, Counsel, I'd like to take up the process that we'll be using to litigate the case going forward. Counsel, as I observed as we began the discussion with scheduling the motion to dismiss, while the parties for post case management plan seem to anticipate that discovery will be stayed pending the briefing and the resolution of the anticipated motion to dismiss, that is not the default rule in this court. I'd be happy to hear argument with respect to an application to stay discovery pending the briefing and resolution of the motion, but I note that it appears that even if fully successful, the motion will not be dispositive of the issues raised in this case. So I would expect to inquire regarding -- I will call it -- the benefit of deferring discovery.

So with that, let me hear first from counsel for plaintiff. I'm interested in hearing what your expectations are regarding the scope and nature of discovery in the case and the amount of time required to complete discovery in order to form my assessment of the parties' proposals for the discovery deadlines here.

Counsel?

MR. RESTITUYO: Yes, your Honor.

So we were not in favor of a stay in discovery. I think we made that very clear, the parties had differing positions. We do not see a need to divert from the Court's proposed schedule with respect to discovery deadlines.

We understand that this case is subject to mandatory mediation. We have no problem with proceeding on, in essence, a dual track, which is continuing with our litigation and seeing if a resolution can be achieved in mediation. We have made certain -- in order to advance the possibility of perhaps meeting defendants halfway, and understanding that they have a fair amount of faith in the mediation process -- perhaps more than we do -- we have agreed to -- we made some demands, or initial demands, as to what our scope of discovery would look like. And given that broad scope of discovery, if they were to agree to it, which is beyond what's automatically required by the pilot program, then we might consider at least a partial stay, in other words, not asking for those document or documents beyond what they've agreed to produce, which is beyond what's required in the mediation, but maybe not the total sum and substance of absolutely everything that we would be entitled to under a regular discovery schedule.

If, in fact, we could reach some agreement, you know, as to these broad strokes, then maybe plaintiffs would be inclined to at least a partial stay, giving mediation a fair chance but not prejudicing our ourselves with respect to the

continuing litigation.

THE COURT: Thank you.

Let me draw you back. Can you tell me, assuming that the case is fully litigated what you expect the discovery in this case will look like? In other words, can you tell me, for example, about any issues that you anticipate with respect to the collection of -- can you give me sense of any third-party discovery that may be necessary here, a sense of the number of depositions, or other matters that may inform my judgment regarding appropriate amount of time to allocate to parties?

MR. RESTITUYO: Fair enough.

So, your Honor, first we anticipate demanding, and we have demanded, Mr. Cardwell's full file, which is all of his employment records, all communications related to his performance. And there's varying distinctions as to what may be in his employment file. Some of it may be just summaries of, you know, performance evaluation, some of it goes to individuals that would have submitted information to help create those summaries, and then there are individuals that would have made comments and determined his assignments along the way. We want the full breath of that.

In addition, because Mr. Cardwell does not function in a vacuum, we would like to see what his New York 2014 class of, you know, associates, what their performance evaluations and how they were treated along the way, since we're claiming that,

you know -- the defense would claim that Mr. Cardwell was a particularly poor performer, we'd like to see how that really did measure across at least his class that year.

We do expect, in addition to seeing their performance reviews and their evaluations and their work assignments, then we do at some point do expect to have expert testimony. We do expect to reach out to an expert. I suspect that they will as well.

And as far as depositions, certainly we expect to be able to depose at least the people that directly evaluated him, the people that determined his assignments. And there's a number of people named in the complaint that were assigned to be his -- quote, end quote -- "mentors" but then subsequently never communicated with him, to get a sense of what they understood their relationship to him and what they understood their responsibility or their duties to him were in the context of sort of his progression at the firm.

THE COURT: Thank you.

Can you give me a sense of the aggregate number of depositions the plaintiff anticipates taking here?

MR. RESTITUYO: Your Honor, that might be tough. If we're talking about expert witnesses, I mean, we expect them to have at least one, and we expect to have at least four to five defendants to be deposed at a minimum, your Honor.

THE COURT: Thank you. You alluded to the prospect of

expert discovery here.

What's the nature of the expert testimony that you anticipate soliciting in connection with this case?

MR. RESTITUYO: Well, your Honor, it's tough because, in the context of big law, there's a pretty cut-throat environment. And so we would have to have an expert speak to the fact that, you know, the cultural nuances that are not just nuances but then lead to discrimination. And you're going to hear from defendants along the way that this is just how big law firm is and, you know, there are these cultural nuances and some people make it and some people don't. And so we need an expert to help us glean out "what is culture" versus "what is discrimination."

THE COURT: Thank you.

Counsel, have the parties discussed issues related to production of the VSI, in particular custodians search terms and the like?

MR. RESTITUYO: We have not yet, your Honor.

THE COURT: Thank you.

Counsel, I take no position at this point regarding the scope of discovery on any issues that will be brought to my attention during the course of the litigation; however, the parties' letter and your comments suggest the prospect that certain of the information that you'll be requesting may be covered by the privilege.

What's your view regarding how that issue should be handled?

MR. RESTITUYO: Well, it's a standard nondisclosure agreement. We've agreed that we'll be signing off nondisclosure attorneys-eyes-only agreements for whatever they produce.

THE COURT: Thank you. Fine.

Let me turn to counsel for defendants. Counsel, I have the same basic question for you:

What's the nature of the discovery and scope of discovery we can expect in connection with this case? I ask you to help me.

MS. BUERGEL: Good afternoon, your Honor. Susana Buergel.

One -- my partner, Mr. Birenboim alluded to this a moment ago. From our perspective and part of the reason that we have proposed that full-blown discovery await further proceedings relates to this district's mandatory mediation program for counsel employment cases. Judge Preska has issued an order that outlines the discovery that parties in counsel employment cases should undertake in aid of that mediation process. And we, as we've discussed with counsel for Mr. Cardwell, have indicated we are prepared to interpret those requirements broadly. We are interested in the requirement that the parties mediate. And so we anticipate that at least

the initial phase of discovery should focus on what that program requires. As Judge Preska's order states, the discovery should be targeted and focused on aiding that mediation process. And that includes information like the plaintiff's personnel file and performance reviews and the like. And as I said, we're prepared to interpret that broadly to aid that process.

So we believe discovery should focus in the first instance on that program and the requirements of the program. I'm happy to turn to what we think discovery would look like if the case is fully litigated.

THE COURT: Thank you. Please do.

MS. BUERGEL: Thank you.

In that case, we actually think it's straightforward in terms of the information that will need to be exchanged but complicated as to how to go about that exchange of information due to the privilege and client-confidentiality issues. We have not fully candidly resolved how all of this is going to play out. And we have not had a complete discussion with plaintiff about how to address all of those issues. We do think there will have to be some specific attention paid to redacting certain information: Client names, potential confidential information of certain clients, and certain relationships and matters that Mr. Cardwell or others may have worked on during his time at the firm. We do not think that a

protective order alone will solve those issues. But as I said, we haven't fully worked through them. And that was largely the motivating factor for the dates that we have proposed in the case management plan, to allow us enough room for the types of review that we will need to do.

And we anticipate this will be not just in the underlying email record, the ESI, but even in the performance review that likely will be subject to discovery here. There's often discussion in performance reviews to specific matters, whether the plaintiff in this matter was able to address certain assignments properly. There's often discussion of the underlying privilege relationship and client information in that context.

THE COURT: Good. Thank you.

So let me just say a few words about the scheduling. First, I appreciate that there may be some complications with respect to handling materials in connection with the discovery in this case. I understand, too, that the parties may wish to focus on the potential for resolving the case amicably through the auspices of the Court's mediation program. Nonetheless, my expectation is to set a set of clear deadline for the parties to complete fact and expert discovery in the case, assuming that the case is fully litigated. I'm happy to set deadlines that will provide some breathing room for the parties to focus on an amicable resolution of the case at the outset, but I do

not expect the deadlines that I'll be establishing to govern the conduct of the parties -- and to find your deadline -- as you complete this litigation in the event that it is not resolved for mediation here.

So I'm happy to hear further argument from counsel for defendants with respect to the suggestion that the discovery periods be bench-marked against the discovery start date if you'd like to offer any.

Counsel for defendants, any additional arguments that you'd like to present regarding why I should implement a floating commencement date for discovery here?

MS. BUERGEL: Your Honor, what we think the critical staging point should be is the effort to mediate. And we are prepared to proceed with that very promptly. We've already had an exchange with counsel for the plaintiff about potential mediators. We are trying to move that along. It is not an effort for delay. So from our perspective, discovery of the start date should be triggered after the conclusion of the mediation, which, again, we're prepared to move through that process simultaneous with preparing the motion that my partner discussed earlier and otherwise responding to the complaint and doing that as part of that process, of course. And under Judge Preska's order, the information that will be exchanged will be a lot of core information about the plaintiff, his personnel file, performance reviews and the like. And that becomes part

of the form of discovery record. So discovery will be proceeding in that form, but we think it should really commence with the conclusion of the mediation process.

THE COURT: Thank you.

Counsel for plaintiff?

MR. RESTITUYO: Your Honor, we vehemently oppose. We disagree with that wholeheartedly. We do think it's an attempt to delay. We do not see why discovery cannot happen in accordance, you know, with your Honor's preset rules. It will not delay mediation, it will not detract from mediation. And certainly, while Judge Preska's rules do indicate that there should be an exchange of information, that exchange is, from our perspective, quite limited.

Among the things -- for example, even if you read -- so one of the things that must be exchanged is the plaintiff's personnel file. Even if you read that in the broadest scope possible, you can't possibly know how Mr. Cardwell was treated in relation to his colleagues, to the same class, unless you actually get to look at the group of individuals that, you know, commenced with him and that, you know, were evaluated at the same time as him and then, you know, continued their career at the same time.

So to say, you know, we're going to offer you his personnel file without being able to look at the broader scope of how things went is really not very helpful for us either in

mediation or as part of the regular overall litigation. And so to stay those aspects of discovery really just means that we're going to be sitting on our hands until after mediation falls through and then we can, you know, start the case then. I don't see a reason for doing that, your Honor.

THE COURT: Thank you.

MS. BUERGEL: Your Honor, may I be heard very briefly in response?

THE COURT: Please.

MS. BUERGEL: Chief Judge Preska's order clearly describes that the discovery protocols that we're required to engage in as part of a mediation process proceed -- and then the order goes on to say that in the event the case is not promptly resolved through mediation, the protocols are intended to assist the parties with further discovery. And under that order, it's an attempt to strike the right balance between the full-blown discovery. Of course, a mandatory mediation program is intended to, among other things, hopefully make the case more efficient for all parties. And the personnel file, the performance reviews and the like are the types of materials contemplated.

Regardless, if we proceed through litigation and we're in full-grown discovery, we do expect to oppose a request that all other members of the plaintiff's incoming class at Davis Polk be subject to discovery. And the case law in this Circuit

-- and this is not the point to argue the point. But the case law in this Circuit does put very clear and strict limitations on comparator information and how broad that discovery can be. And it simply will not be the case that every other associate in that incoming class and all their records, performance, assignments they were given and the like would be subject to discovery. It must be limited to others who are similarly situated, which, again, cases in the Circuit describe as folks who were subject to the same supervision within the same group, etc.

So it would be a much narrower set of discovery that we anticipate on that front yet to be determined. And obviously we're happy to discuss it in good faith with our adversaries. But to be clear, we disagree that discovery is going to involve that broad scope as far as everyone else who joined the firm with Mr. Cardwell.

THE COURT: Thank you.

MR. RESTITUYO: Just to be clear, with regard to the mandatory mediation order, your Honor, to be clear, mandatory mediation according to that order does not have to happen until 60 days after there's an answer in the pleading; which, in this case that pleading will not show up till February 10th, to say the least. And so we're talking about two months beyond that. So we're talking about four months from today at least before any additional disclosure.

And while opposing counsel does mention the fact that there's going to be a dispute with respect to how broad a discovery beyond the mediation letter we're entitled to, the fact is that we are entitled to some and we will be seeking definitely information beyond what we're entitled to in the mediation order. And so we'd rather, if we're going to have that fight, have it sooner rather than later, your Honor.

THE COURT: Thank you. Good.

Thank you counsel for your arguments with respect to this issue. I appreciate the positions of each of the parties.

MR. BIRENBOIM: Your Honor, may I clarify one thing about the calendar?

THE COURT: Yes. Please feel free.

MR. BIRENBOIM: Counsel is correct that mandatory mediation under the Southern District rules must begin 30 days after the answer. But there's nothing that prevents it from starting earlier. And we are prepared to select a mediator and pursue mediation right away and not wait for the filing of that answer.

THE COURT: Good. Thank you very much.

So, Counsel, thank you very much for your arguments with respect to this issue. I appreciate the positions of both sets of parties with respect to it. I'm going to set a schedule that will provide for concrete deadlines for completion of fact and expert discovery. That will be summed

down to a time from now. I'm happy to work with the parties' initial proposal and perhaps to add some additional time to the extent necessary to permit the parties to add time to focus on mediating the dispute at the outset. But I do want to set a series of clear deadlines.

A standing order with respect to employment mediation issues most pointedly does not stay discovery pending the mediation, and provides a helpful framework to focus the parties with respect to mediation. It does not establish a default discovery stay in these matters. My hope is that we will set a schedule now that will establish adequate time for the parties to complete work here, assuming that the case is fully litigated, and that will also provide some time in with which the parties can focus on the exchange of information in accordance with standing order or otherwise.

So, Counsel, when I refer to the initial proposal by the parties, I'm referring to the 240-day deadline from the discovery start date. By my math, that would be August 20th of 2020, which is an extended period of time to complete discovery in this case, but perhaps an extended period that would be warranted given the parties hope to focus on a mediation at the outset of the case.

Counsel, I'd like to hear any arguments regarding whether to what extent that's the appropriate end date for completion of fact discovery. I believe it's more than

adequate to permit the parties to do the work here and focus on early mediation.

So, counsel for plaintiff, let's hear you.

MR. JEFFRIES: May I, your Honor?

THE COURT: Please.

MR. JEFFRIES: Just with respect to your Honor instituting an August 2020 date for the discovery, I would simply supplement what cocounsel has said with respect to our client's belief about mediation, your Honor.

Yes, it is mandatory mediation. And, yes, Mr. Cardwell understands his obligation to participate. And I think that that's kind of where the agreement begins and ends, because Mr. Cardwell, by virtue of the backdrop of this case, and by virtue of the things that have happened in a continuous fashion, does not share our expectation and belief that mediation will provide a favorable outcome. He has experienced firsthand actions on behalf of the defendants that paint them in the light of bad actors. He has, since the date of his claim being put in with EEOC, been subject to reputational harms, and been subject to economic harms, and for all intents and purposes, been looked at as an outcast.

Mr. Kaloma's position is that, although it doesn't reconcile with the actual scheduling put forth by the Court and the actual scheduling that relies on the legal system, but Mr. Kaloma's position is that in as far as his time to make

this case and to have this case be heard, he's in overtime. He's been through an extensive administrative proceeding. He is now within the rigors of discovery. And he wants it to be clearly communicated that the goal is to get in front of a jury, and that there will be the attempts made to settle this through mediation. But based off of the position of the actors involved so far, that does not look like a balance about to be struck. And so I'd like your Honor to consider that when looking toward the extended time frame in this case, that of August 2020. It simply puts Mr. Kaloma in a position where he is continuing to have his life placed on hold as this matter lingers.

THE COURT: Thank you. Good.

Let me hear from counsel for defendant.

MS. BUERGEL: Your Honor, just very briefly.

I would note as it relates to the timing of this matter and where we find ourselves. By our calculation, Mr. Cardwell was entitled to seek a right-to-sue letter from the EEOC 180 days after he filed his complaint. He did not do so. He waited over a year, plus longer, to do so. So the fact that we find ourselves at the end of 2019 appearing before a Judge for the first time is really stemming from choices made by the plaintiff.

All that said, as we've said many times now this afternoon, we are prepared to proceed with the mediation in

good faith. We are eager to do so. We're also prepared, hearing your Honor, to begin the discovery process. We would just ask that your Honor consider in setting an August deadline. Perhaps we could have something in September. We all know as a practical matter, depositions wind up toward the end of the period. And scheduling depositions in August in New York in my experience tends to be a bit of a challenge. But, otherwise, we have heard your Honor and we will accept the schedule that you set.

THE COURT: Yes. Fine. Thank you. Good.

So let's begin with the deadline for completion of fact discovery. Here, agreeing with counsel for defendants, August is often a less effective time to take discovery here. I think that's a justification for pushing out the completion date for discovery till mid September. I appreciate the arguments raised by counsel for plaintiff, but given the scope and all of the discovery that's anticipated here, this is a reasonable period of time in which the parties can complete their work.

The deadline for completion of fact discovery will be September 16 of 2020. That does not give you must extra time, but it gives you some extra time in September to complete that work.

I'd like to propose that initial request for production of documents and interrogatories be no later than

March 2nd, 2020. Depositions, I propose to be consistent with the defendants' proposal if you completed them later than the last date as specified in the completion of fact discovery. The request is maybe due in approximately 30 days prior to the date scheduled for completion of fact discovery.

Here, with respect to expert testimony, I take no position regarding whether and to what extent this category of expert testimony suggested by plaintiff will ultimately be admissible in the case. Still I recognize that there is a desire potentially to do these expert testimonies in connection with this matter. And I'd like to establish a period of time for the parties to do that work.

Counsel for plaintiff, why are you proposing -- or why has it been proposed to the Court that your expert disclosures not be made until the date that's 20 days after the close of fact discovery?

Can you not provide those disclosures by the default date provided for under my proposed case management plan and scheduling order?

MR. RESTITUYO: We can, your Honor.

THE COURT: Good. Thank you.

Counsel for defendants, why are you proposing that you need two months to file any expert disclosures with respect to any experts that may be called by defendants in response to any plaintiff's experts or otherwise?

Counsel?

MS. BUERGEL: What's proposed here, we understand is an exchange of the full expert reports, and that's why we have asked for the time.

THE COURT: Thank you. Can you do it in a more expedited basis such as 30 days after the disclosures of the parties are in?

MS. BUERGEL: We can, your Honor.

THE COURT: Good. Thank you.

So the deadline then for completion of expert discovery will be as follows:

The deadline for party proponents' disclosures will be the same date as the close of fact discovery. Any parties' opponent disclosures will be due no later than 30 days following the disclosures by the parties. All expert discovery will be completed no later than 30 days. In other words, you'll have a month to complete depositions with respect to each of your respective experts following the defendants' disclosures. The motion for summary judgment will be due no later than 30 days following the close of expert discovery.

So, Counsel, I'll issue an order setting forth these deadlines. Let me just note a few things about the deadlines that I'm establishing pursuant to the case plan and scheduling order.

First, these are relatively extended deadlines. I've

established deadlines with the focus of the parties on mediating the case, which we'll discuss momentarily, and also recognizing the types of issues related to privilege and confidentiality that we've discussed regarding the potential information that would be provided by the defendants in this case. So I established an extended period for completion of discovery.

With that in mind, please think of these as your deadlines. They are real deadlines. They are deadlines for the completion of fact discovery and expert discovery, where the case manager says that fact or expert discoveries to be completed by a date -- I recognize that that's the product of a potential word choice by me or perhaps my expectation that you will have completed discovery by the relevant date. That means that there will be no more of it after that date. There are a corollaries that flow from that general rule. You can extrapolate them yourselves. I want to highlight just a few of them right now.

First, to the extent that there are any disputes regarding the advocacy of your adversary's production of any discover or any third-party responses to your requests, do not forward or sit on those discovery disputes until the end of much less after the close of fact discovery. That's because this is, again, the deadline for completion of discovery. If you sit on or hoard a discovery dispute until late in the

discovery period, you may find that I will take the position that you've waived the opportunity to ask the Court to call for production of documents and materials, because it's the deadline for completion of fact discovery, not the date for commencement of litigation about discovery. So be mindful of that.

Similarly, be mindful of the fact that this is a deadline for completion of discovery as you're making requests for production of materials, and taking depositions, and scheduling them. To put it very simply: If you wait until late in the process to take a deposition or request for information, you will have less time to come back to follow up discovery with respect to any information that you may glean during the course of the deposition or from the materials that have been produced. So please keep that in mind.

And now, all of these are real deadlines, but if you want to highlight paragraph 18C, those will require that parties provide all of their expert disclosures pursuant to 20(e) and all about disclosures required under the rules. Not just your experts' name, but her report and all the other things that are required under the rules. If you fail to provide all of the requisite disclosures, you should not expect that your expert will be permitted to provide testimony or other evidence in the case.

So, Counsel, I will grant extensions of these

deadlines, but only for good cause shown and only if the application is made timely and consistent with the case management plan itself and my individual rules. Be mindful that I do scrutinize requests to the ensure that there is good cause for an application for extension of the deadlines. The fact that the parties may have agreed upon an extension, you should not expect it necessarily, because I'll be looking for justification for request of an extension. In that regard, please be mindful that my expectation is that the parties will make professional judgments about the amount of resources they want to invest in the case, and that you should not expect that I'll necessary find good cause in the fact that you chose to focus on something else rather than this matter.

Similarly, while I'm about to talk to you about the prospect of settling the case, be mindful that my expectation is that you'll be working to resolve and/or litigate the case fully. You should not expect that I'll find good cause because the parties failed do the necessary work to litigate this case on basis of a hope or expectation that the case would resolve itself.

Plaintiff's counsel, I'm not sure that that would be a viable argument.

So, counsel, please be mindful of that. There's one thing we did not specifically discuss that I'd like to come back to, which is the deadline for initial disclosures under

26(a).

Counsel for plaintiff, what's your proposal for initial disclosures in paragraph five of the case management plan?

The default --

MR. RESTITUYO: Yes. It's two weeks. The default, we've explained, we have no problems with doing it.

THE COURT: Thank you.

Counsel for defendant?

MS. BUERGEL: Your Honor, we understand that Judge Preska's order does, in fact, supersede the parties' obligations under 26(a).

THE COURT: Thank you.

That's a standing order, which I can and will now override.

So what's your position?

MS. BUERGEL: We'd like 30 days if we can, your Honor, given the number of defendants, and we need to reach out of to all those folks and coordinate the effort with the holidays.

THE COURT: Good. Thank you. I'm happy to embrace that initial disclosure under 26(a)(1) and will be due in approximately 30 days from today, January 2020.

Good.

MS. BUERGEL: Thank you, your Honor.

May I raise one other issue about the schedule?

THE COURT: Yes. Please feel free.

MS. BUERGEL: We will request one additional deadline as it relates to experts, given what you've heard today and what may be surrounded by the subject of expert testimony. We would request 30 days before plaintiffs are required to disclose their expert's report, and identity, and the like, that they identify for us the subject matters on which they'll be providing expert testimony, so we have an opportunity, given to short turnaround for our responsive reports, to consider those topics and potentially identify experts for our own use.

THE COURT: Counsel for plaintiff, what's your position regarding that request?

MR. RESTITUYO: Your Honor, I'd almost rather give them a little bit more time on the back end rather than the front end, because that, in essence, forces us to have an expert evaluate certain testimony before even our deadline in order to give them the appropriate time. So, in essence, what it does is it cuts our discovery deadline short by at least 30 days.

THE COURT: Thank you.

I understand the request is that I require you to provide notice regarding the anticipated topics for expert discovery. If you prefer, I could have add this time to their opposition deadline. Part of the reason why I adopted the 30 rather than a 60-day period was the response to the plaintiff's

argument that you wanted to get to trial sooner. If you prefer that I embrace that approach, please let me know.

MR. RESTITUYO: Yeah. We're okay with that, your Honor.

THE COURT: Thank you. That's fine.

So I modified the proposed case management plan to provide the defendants 60 days to respond to the expert reports that are provided by the plaintiff or party proponent. The remaining days will move back for a shorter period of time. Thank you.

Good. So, Counsel, so I'd like to just say a few words about the prospect for resolving the case. I strongly urge you to talk about resolving the case amicably here. I direct these comments to all of you. I understand the plaintiff's concerns as expressed here. Remember that going into this mediation does not mean that you're agreeing to settle. It doesn't mean that you're going into it with an open mind, with the expectation they are going to be working with people who are working to resolve the case in good faith. So I ask you to take that position as you're going into the mediation itself, which I understand you'll be scheduling promptly.

As counsel for defendants stated, you need not wait until after an answer is filed in order to schedule the mediation in a case such as this, given the burden associated

with it from all sides, and the plaintiff's desire for an early resolution of a matter in which he's been involved for a substantial period of time already. It may make sense for you to try to work together collectively to establish a mediation date that would be much sooner than the default rule. So I strongly encourage you to do that.

Is there anything else that I can do to help the parties resolve the case amicably, counsel for plaintiff?

MR. RESTITUYO: Not at this point, your Honor.

I think we've been having conversations with defendants' counsel and we are, one, outlining certain parameters, which I guess each side has had candid conversations with their clients about, and also we are, in the meantime, negotiating with respect to the process. They have provided us with a list of their potential desired mediators. I think there's some -- to the extent that the Court can be helpful, it would be whether we, you know, put us in or force us into the mandatory court mediation process so that, if we aren't able to reach an agreement with respect to a proposed mediator, we at least have a default that, you know, rather than have to come back to court and request that that be assigned.

THE COURT: Thank you.

Bear with me for just one moment, please.

(Pause)

THE COURT: So two comments with respect to that:

First, Counsel, please feel free to write me if you think it would be helpful for me to refer you to the Court annex mediation program. The other thing that I'd remind you of also is that I'd be happy to assign you to the magistrate judge. In this case it's Judge Aaron. If you wish, I can refer you to a resource. If you want me to refer you either to the mediation program or to Judge Aaron for a mediation session or sessions, please write me sufficiently in advance of the date you wish to hold the mediation. District judges' schedules are relatively congested.

Anything else that I can do in this regard for defendants?

Counsel?

MR. JOHNSON: Not from defendants, your Honor.

THE COURT: Good. Thank you very much.

Anything else before we adjourn, first counsel for plaintiff?

MR. RESTITUYO: No, your Honor, thank you.

MR. JEFFRIES: No, your Honor. Thank you.

THE COURT: Counsel for defendants?

MR. BIRENBOIM: No. Thank you, your Honor.

THE COURT: Thank you very much.

This proceeding is adjourned.

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